NECESSITY TO ESTABLISH IDENTITY IN ORDER TO RENDER TELEPHONIC CONVERSATION ADMISSIBLE.—On this subject there seems to be two distinct rules in the trend of modern decisions. The courts are agreed that a telephonic conversation is admissible, when the witness can identify the voice of the person with whom the conversation is held;[1] or if the witness by subsequent acquaintance is enabled to identify the voice, the conversation is admissible;[2] and any circumstances tending to show that the defendant answered the call giving rise to the alleged conversation, has been held sufficient to put the evidence before the jury.[3]

The courts following the rule properly expressible as the strict rule are somewhat in the minority. Illustrating this view is the recent case of *Mankes* v. *Fishman* (App. Div.), 149 N. Y. Supp. 228. The plaintiff, a plumber, and one Sherman with whom he had a contract to do work, together visited the defendant's plumbing shop in New York City and ordered certain supplies to be shipped immediately, as the plaintiff alleged. None of the goods arrived until about ten days had elapsed. The plaintiff sued for the damages caused by the delay and the defendant offered evidence to show that the goods were shipped promptly. The witness, Sherman, called by the plaintiff, testified that at least one week after the purchase, the witness put in a telephone call for the defendant, Fishman, in New York City; that the witness would not say he recognized the defendant's voice on the telephone, but that he asked whom it was, and the person answering told him it was Fishman; and that he had a conversation with him. The witness then was permitted to testify, over the objection and exception of the defendant: "I asked him what was the reason why he didn't send out Mr. Mankes' order. * * * He told me: 'I am not going to send the goods to a man of that kind. * * * '" The defendant denied having any such conversation and there was nothing in the record confirmatory of the person talked with being the defendant. The New York Supreme Court held that the evidence of Sherman was probably extremely prejudicial to the interests of the defendant and its admission to be reversible error. This view is well established in New York.[4] And it would seem also in Pennsylvania.[5] The doctrine has been carried to the extreme in a recent Georgia case.[6] In that case the plaintiff's witness testified that he called the West-

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[1] Barrett *v.* Manger, 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531.

[2] People *v.* Strollo, 191 N. Y. 42, 83 N. E. 573.

[3] Cox *v.* Cline, 147 Ia. 353, 126 N. W. 330.

[4] Murphy *v.* Jack, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590.

[5] Swing *v.* Walker, 27 Pa. Sup. Ct. 366. The court intimates, however, that had the nature of the evidence been other than an admission against the defendant, without identification, it might have been admissible.

[6] Planter's Cotton Oil Co. *v.* Western Union Tel. Co., 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180.

ern Union office over the telephone, and upon receiving a response, asked whether he was speaking to the Western Union Telegraph office. On being answered in the affirmative, he then dictated a telegram, which was repeated to him to insure correctness; but the witness was unable to identify the person with whom he talked. The court admitted the evidence but directed a verdict for the defendant, on the ground that, according to the evidence, no agency had been established showing receipt of the telegram for transmission.

What may be termed the liberal view is growing in favor in this country. The courts adopting this view hold, by analogy, that a telephonic communication is as admissible as a face to face conversation with a clerk behind the counter, without proof of the clerk's identity;[7] and that when a call is made for a certain person over the telephone and someone answers who assumes to be that person, the *prima facie* presumption is that the person answering is the person called.[8] *A fortiori* such a presumption is raised in a telephone call to an office in the regular routine of business. Such a presumption extends to the identification of the person answering as an agent if he assumes to act in that capacity.[9] Telephonic conversation as evidence under this view is admitted when proper as part of the *res gestæ;* it is taken for what it is worth; its weight is for the jury.[10]

The courts take judicial notice of the mechanical improvements of the age and of the inherent nature of all telephonic communication; its weight as evidence is for the triers of fact.[11] The telephone plays so large a part in the affairs of our commercial life that, as a letter, properly addressed, stamped, and posted is presumed to be received, so a telephone call, properly made, presumptively, should identify the person who assumes to answer.[12] When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel.[13] This view is fully justified by business custom.

To whatever extent the admission of telephonic communications with otherwise unidentified persons who are sought to be held may be sustained, the reverse of this proposition does not hold good. It is an entirely different matter where the witness is called to the telephone and there is nothing on which to rely save an alleged conversation with an unknown person at an unknown place. In these

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[7] Wolfe *v.* Mo. Pac. R. R. Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331.
[8] Guest *v.* Hannibal, etc., R. R. Co., 77 Mo. App. 258.
[9] Guest *v.* Hannibal, etc., *supra.*
[10] Godair *v.* Ham. Nat. Bank, 225 Ill. 572, 80 N. E. 407.
[11] Wolfe *v.* Mo. Pac. R. R. Co., *supra.*
[12] Guest *v.* Hannibal, etc., *supra.* See Thompson *v.* Appleby, 5 Kan App. 680, 48 Pac. 933.
[13] Wolfe *v.* Mo. Pac. R. R. Co., *supra.*

instances, the probability of fraud is so greatly increased that the courts are justified in excluding such evidence from the jury altogether.[14]

ATTESTATION OF WILL BY WITNESSES WHEN TESTATORS' SIGNATURE IS CONCEALED.—Beginning with the Statute of Frauds various statutes have been enacted prescribing certain forms for the execution of wills in order to prevent fraud in the administration of estates. And since the right to dispose of property by will is wholly dependent upon statutory enactment, in order to determine the validity of any will it is necessary to refer it to some particular statute. It is almost universally required that a will be in writing and signed by the testator or by a person in his presence and by his express direction and also that it be witnessed. The usual requirement as to witnesses is that a certain number attest and subscribe in the testator's presence.[1]

A careful distinction must be made between the words "attest" and "subscribe." To "attest" a will is "to know that it was published as such and to certify the facts required to constitute an actual and legal publication," [2] while "subscribe" means "to sign at the end." [3] As has been said: "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses; subscription is the act of the hand; the one mental, the other mechanical." [4] Attestation is the act of the mind in bearing witness to the signature and the subscription is the evidence of the previous attestation intended to preserve the proof of attestation in case of the witnesses' death.[5]

Clearly the simplest and best way to attest a signature is to see the testator actually write his name. This obviously satisfies the most rigid requirements and is uniformly held a good attestation.[6] It seems also sufficient if the testator signs his name some time previously and then shows it to the witnesses, acknowledging it to be his own. This slight laxity has been regarded of no consequence.[7]

Going a little further, it seems to be settled now that when the will is presented to witnesses, with the testator's signature plainly visible and acknowledged by him to be his will and the witnesses

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[14] Vaughn *v.* State, 130 Ala. 18, 30 South. 669. The court does not base its decisions on these grounds but it is obvious that these considerations apply.

[1] Webster *v.* Yorty, 194 Ill. 408, 62 N. E. 907; 1 JARMAN, WILLS, 115.

[2] Swift *v.* Wiley, 40 Ky. 114.

[3] Coon *v.* Rigden, 4 Col. 275; Lawson *v.* Dawson's Estate, 21 Tex. Civ. App. 361, 53 S. W. 64.

[4] Dougherty *v.* Crandall, 168 Mich. 281, 134 N. W. 24.

[5] Chase *v.* Kittredge, 11 Allen (Mass.) 49, 87 Am. Dec. 687.

[6] 1 JARMAN, WILLS, 112.

[7] See Woodruff *v.* Hundley, 127 Ala. 640, 29 South. 98.